In the Supreme Court

OF THE

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OCTOBER TERM, 1945

No.

H. MOFFAT COMPANY (a corporation),
Petitioner and Appellee below,
vs.
SOUTHERN PACIFIC COMPANY
(a corporation),
Respondent and Appellant below.

No 162

(CONSOLIDATED CASES)

UNION SHEEP COMPANY (a corporation),
Petitioner and Appellee below,
vs.
SOUTHERN PACIFIC COMPANY
(a corporation),
Respondent and Appellant below.

No. 163

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

	Page
Petition for Writ of Certiorari	1
Summary Statement of Matters Involved	2
Judicial Statement	7
Questions Presented	8
Reasons Relied on for the Allowance of the Writ	8
Brief in Support of Petition	13
Jurisdiction	14
Statement of the Case	14
Specifications of Error	14
Argument	15
(1) May a Circuit Court of Appeals, where a District Court has made a finding that a plaintiff in the District Court (appellant in the Circuit Court) has failed to prove sufficient facts upon which a judgment could be based, and such finding is supported by the record, remand the case to the District Court with instructions to enter a judgment for the plaintiff if sufficient evidence is in the record and, if sufficient evidence is not in the record, to take further evidence to determine the matter where the plaintiff had previously made no effort to supply the required evidence on the trial in the District Court?	15
(2) If a Circuit Court may enter such a judgment as is mentioned in the previous question, should not the costs of the appeal be charged against the person whose duty it was to supply the necessary evidence in the trial court in the first instance?	20

Table of Authorities Cited

Cases

	Pages
Buckley v. Christmas (4th Circuit), 121 Fed. (2d) 323	9, 17
Halsted v. Buster & McGee, 119 U. S. 341	10, 21
Penninsular Iron Company v. Stone, 121 U. S. 631	10, 21
Smith v. Weeks (C.C.A., 1st Circuit), 53 Fed. 758	10, 19
Southern Pacific v. United States, 272 U. S. 445	10, 18, 20
Strong-Scott Mfg. Co. v. Weller (8th Circuit), 112 Fed. (2d) 389	9, 17
United States v. Rodiek (C.C.A., 2nd Circuit), 120 Fed. (2d) 760	9, 18
United States v. State Street Trust Company (C.C.A., 1st Circuit), 124 Fed. (2d) 948	9, 17

Statutes

Judicial Code:	
Section 240 (28 USCA, Section 347)	7
Section 240(a) (28 USCA, Section 347)	14
Judiciary, R. S. Section 1008	7
26 Stat. 828, c. 517, Section 6	7
34 Stat. 607, c. 3594, Section 1	3
39 Stat. 727, c. 448, Section 6	7
43 Stat. 940, c. 229, Section 8 (a, b, d)	7
28 USCA, Section 350	7
45 USCA, Sections 1 and 2, 71 and 72	3

Rules

Federal Rules of Civil Procedure, Rule 52(a)	9

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PETITION FOR WRIT OF CERTIORARI
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for the Ninth Circuit.

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED.

The two actions here involved were brought by respondent in the District Court of the United States for the District of Nevada. The pleadings in both actions are the same except for the amount claimed. They were consolidated for trial in the District Court and heard together in the Circuit Court of Appeals. References herein to the Record are to the record in Southern Pacific Company vs. H. Moffat Company (No. 11,077) unless otherwise noted.

The first action was brought against petitioner H. Moffat Company to recover three thousand five hundred eight and 81/100 dollars ($3,580.81) (R. 2-6), and the second against petitioner Union Sheep Company for three thousand one hundred eight and 77/100 dollars ($3,108.77). (R. 2-6, Action 11,078 in Circuit Court.) Respondent was and is a common carrier, operating interstate railroad lines. (R. 2-3, 77.) The petitioners were engaged in the meat packing business and from the 1st day of August, 1938, to and including the 2nd day of October, 1940, petitioners shipped livestock over the railroad lines operated by respondent. (R. 319-320; R. 3-4, 77.) In order to comply with the requirements of an Act of Congress known as the "28-Hour Law" (June 29, 1906, c. 3594, Section 1,

34 Stat. 607; Sections 1 and 2, 45 USCA, Sections 71 and 72) and at the request of petitioners, the respondent caused certain of the livestock shipped over its lines by petitioners to be unloaded at stockyards at Sparks, Nevada, and rested, watered and fed. (R. 4, 77.) When such feeding and watering is required by the terms of the law mentioned, it may be under the provisions thereof performed by the railroad "at the reasonable expense of the owner". The stockyards at Sparks, Nevada, were owned by respondent but leased to a corporation known as the Western Livestock Service Company, hereinafter called the Livestock Company. The Livestock Company by contract performed the watering and feeding services for the railroad. (R. 98-116, 198.)

The Livestock Company was wholly owned by Swift and Company and Armour and Company, two packing company competitors of petitioners. (R. 287-288.)

The livestock so rested, fed and watered was thereafter by the Livestock Company reloaded on the railroad cars and such company thereafter submitted to respondent its bills for the services rendered, which bills respondent paid. (R. 166-167.) The charges made by the Livestock Company to the respondent were based upon the contract between respondent and such company. (R. 166.) This contract petitioners contended in the District Court was merely a rebating device for the benefit of Swift and Company and Armour and Company and not a bona fide contract for the rendering of services upon a reasonable basis. The trial Court found in accordance with petitioners' con-

tention on this phase of the case. (Finding XXII, R. 140.) Respondent billed petitioners for the amount it had paid the Livestock Company and petitioners refused to pay the sums billed. (R. 324.) Thereupon the two actions here involved were brought in the District Court. The complaint in each action alleged two causes of action, the first having for its purpose the recovery of the amount sought based upon the alleged existence of a tariff filed with the Interstate Commerce Commission, and the second having for its purpose the recovery of the sums claimed upon the basis that respondent had furnished the feed and rendered the service at the request of petitioners, and that the amounts charged therefor were reasonable. (R. 2-6, Action 11,078, R. 2-6.) During the trial in the District Court petitioners paid the so-called service charges (R. 540-542), leaving for determination only the amount claimed to be due for feed furnished. No tariff covering the charges made for feed furnished was produced on the trial, thus leaving for determination only the alleged cause of action for the feed furnished.

After the trial was had and the cases submitted, the trial Court rendered a decision in which it vacated the submission subject to the right of the parties to present further evidence. (R. 121-128.) In this decision the trial Court stated that it was its conclusion that the plaintiff was not entitled to recover an amount in excess of the actual net cost to the Livestock Company for the services rendered by it or an amount in excess of the actual net cost to Swift and Company for similar services during the time in question. (R. 128.)

It further decided that the evidence then before the Court was insufficient to determine such amounts. (R. 128.) Thereafter, a further hearing was had and further evidence taken. In neither trial, however, did the respondent produce evidence of the total amount of feed furnished to petitioners' livestock or the total reasonable value of such feed. It produced evidence as to the amount per ton of hay it had charged petitioners (R. 166) and evidence of the cost per ton of hay. (R. 239-244.) Its claim for feed furnished was intermingled with the service charges (R. 33-76) which had been made and paid, and it was impossible to determine from the record even the exact amount claimed by respondent for feed furnished.

On September 25, 1944, the District Court entered a judgment dismissing the two actions. (R. 128-131.) The trial Court found that the amounts charged petitioners per ton for the feed furnished were unreasonable, unjust and excessive (R. 136), and further found that respondent had failed to prove the reasonable cost of or the amount of feed furnished to petitioners' livestock. (R. 141.) Respondent appealed to the Circuit Court of Appeals for the Ninth Circuit. (R. 145.) Throughout the trial of the case and until oral argument in the Circuit Court of Appeals, respondent insisted it was entitled to recover from petitioners the amounts charged it by the Livestock Company for the service of feeding, resting and watering the livestock, and further maintained that the trial Court was without jurisdiction to determine the reasonable value of the feed furnished, such being the exclusive function of the Interstate Commerce Com-

mission. At the time of the oral argument in the Circuit Court of Appeals, respondent abandoned its contention that the lower Court was without jurisdiction to determine the reasonable cost of the feed furnished and there urged that the judgment of the lower Court should be reversed and the cause remanded with instructions to the lower Court to determine the reasonable cost of the feed furnished. (Opinion of Circuit Court, R. 575-576.)

The Circuit Court held:

> "Upon the facts alleged by appellant, and admitted by appellees, appellant was entitled to a judgment against each appellee for the reasonable value of the feed furnished by the Livestock Company to such appellee. The trial court made a finding that from the evidence introduced, it could not determine such reasonable value. The fact remains, however, that appellees were furnished the feed and received the benefit thereof. Appellant paid the Livestock Company for said feed. To permit appellees to retain such benefit at the expense of appellant would be an unjust discrimination in their favor." (R. 576.)

The Circuit Court thereupon reversed the judgment of the District Court and remanded the causes with directions to the lower Court to find the reasonable value of the feed furnished and to enter judgments in favor of respondent for the reasonable value of the feed so found by it. The decision of the Circuit Court provided that in the event the trial Court was unable to find such value from the evidence incorporated in the record, it was directed to reopen the case to permit

the introduction of further evidence of the reasonable value of the feed furnished. (R. 576-577.) The decision and judgment of the Circuit Court of Appeals was rendered and filed March 14, 1946. (R. 577-578.) A petition for rehearing of said causes was filed on April 4, 1946, which petition was on April 11, 1946, denied. (R. 578-579.) The costs of the appeal were taxed against petitioners. (R. 578.)

JURISDICTIONAL STATEMENT.

It is contended that the Supreme Court has jurisdiction to review the judgment herein questioned by reason of the provisions of Section 240 of the Judicial Code (28 USCA, Section 347), whereby the Supreme Court may require by certiorari, either before or after a judgment or decree by the Circuit Court of Appeals, that a cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the Circuit Court of Appeals was entered and filed March 14, 1946. A timely petition for rehearing was made therein on April 4, 1946, and denied on April 11, 1946. The application herein is made within the time required. (Sec. 350 USCA, Title 28, Judicial Code and Judiciary, R.S. § 1008; Mar. 3, 1891, c. 517, § 6, 26 Stat. 828; Sept. 6, 1916, c. 448, § 6, 39 Stat. 727; Feb. 13, 1925, c. 229, § 8 (a, b, d), 43 Stat. 940).)

QUESTIONS PRESENTED.

The questions herein presented are:

(1) May a Circuit Court of Appeals, where a District Court has made a finding that a plaintiff in the District Court (appellant in the Circuit Court) has failed to prove sufficient facts upon which a judgment could be based, and such finding is supported by the record, remand the case to the District Court with instructions to enter a judgment for the plaintiff if sufficient evidence is in the record and, if sufficient evidence is not in the record, to take further evidence to determine the matter where the plaintiff had previously made no effort to supply the required evidence on the trial in the District Court?

(2) If a Circuit Court may enter such a judgment as is mentioned in the previous question, should not the costs of the appeal be charged against the person whose duty it was to supply the necessary evidence in the trial Court in the first instance?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A.

In view of the finding of the District Court that appellant had "failed to prove the reasonable cost of or the amount of feed fed to defendants' livestock * * *", the decision of the Circuit Court remanding the causes to the District Court with instructions to

enter judgments in favor of appellant for the reasonable value of the feed as found by it, *if it could find such value from the evidence then incorporated in the record:* (1) So far departs from the accepted and usual course of federal judicial proceedings as to call for the exercise of this Court's supervision, for by Rule 52(a) of the Federal Rules of Civil Procedure such finding should not have been set aside unless clearly erroneous; (2) Conflicts with the holdings of other circuits that a finding of the trial Court should not be set aside unless clearly erroneous or against the clear weight of the evidence as decided in *United States v. State Street Trust Company* (CCA, 1st Circuit), 124 Fed. (2d) 948; *Strong-Scott Mfg. Co. v. Weller* (8th Circuit), 112 Fed. (2d) 389; *Buckley v. Christmas* (4th Circuit), 121 Fed. (2d) 323.

B.

The decision of the Circuit Court of Appeals in remanding the causes to the District Court with instructions to receive further evidence on the question of the value of the feed fed to petitioners' livestock departs from the accepted and usual course of federal judicial proceedings, is in conflict with the rules laid down in other circuits, and probably conflicts with applicable decisions of the Supreme Court for: (1) an appellant is not entitled to have a case remanded so as to enable it to establish a cause of action or defense which it made no effort to prove on the trial, *United States v. Rodiek* (C.C.A., 2nd Circuit), 120 Fed. (2d) 760; (2) an Appellate Court is not authorized to remand a case unless it reverses it, and where there is

no error of which the Appellate Court can take jurisdiction, it is not authorized to reverse. *Smith v. Weeks* (C.C.A., 1st Circuit), 53 Fed. 758; (3) if an appellant has failed in the trial Court to prove essential facts necessary to entitle it to a judgment, the cause should be affirmed. *Southern Pacific v. United States,* 272 U.S. 445.

C.

The decision of the Circuit Court of Appeals in remanding the case for the taking of further evidence without providing that the costs of appeal should be borne by the respondent here and not by the petitioners is contrary to the rule of this Court that where a reversal is required of a judgment because of the fault of one party, that party should bear the costs of the appeal even though such party is the prevailing party on the appeal. *Halsted v. Buster & McGee,* 119 U.S. 341; *Peninsular Iron Company v. Stone,* 121 U.S. 631.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court had in the cases numbered and entitled on its docket: Southern Pacific Company, a corporation, Appellant, vs. H. Moffat Company, a corporation, Appellee, No. 11,077, and Southern Pacific Company, a corporation, Appellant, vs. Union Sheep Company, a corporation, Appellee,

No. 11,078, to the end that said causes may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court be reversed by the Court, and for such other and further relief as to the Court may seem proper.

Dated, Reno, Nevada,
June 5, 1946.

GEO. B. THATCHER,
WM. WOODBURN,
Counsel for Petitioners.

WM. J. FORMAN,
Of Counsel for Petitioners.

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Respondent and Appellant below.

BRIEF IN SUPPORT OF PETITION.

The opinion of the lower Court was by Frank H. Norcross, District Judge, and is reported in 45 Fed. Supp. 924. The opinion of the Circuit Court of Appeals

is not yet reported but is set forth in full in the record herein. (R. 572-577.)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code. (28 USCA, 347.)

STATEMENT OF THE CASE.

This has already been stated in the preceding petition, which statement is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERROR.

(a) The Circuit Court of Appeals erred in remanding the case to the District Court with instructions to enter a judgment for the plaintiff if sufficient evidence was in the record and if sufficient evidence was not in the record, to take further evidence to determine the matter in view of the finding of the District Court that the plaintiff had failed to prove sufficient facts upon which a judgment could be based and such finding being supported by the record, and in view of the fact that the plaintiff had previously made no effort to supply the required evidence on the trial in the District Court.

(b) The Circuit Court of Appeals erred in not providing in its judgment that the appellant should bear the costs of the appeal.

ARGUMENT.

(1) MAY A CIRCUIT COURT OF APPEALS, WHERE A DISTRICT COURT HAS MADE A FINDING THAT A PLAINTIFF IN THE DISTRICT COURT (APPELLANT IN THE CIRCUIT COURT) HAS FAILED TO PROVE SUFFICIENT FACTS UPON WHICH A JUDGMENT COULD BE BASED, AND SUCH FINDING IS SUPPORTED BY THE RECORD, REMAND THE CASE TO THE DISTRICT COURT WITH INSTRUCTIONS TO ENTER A JUDGMENT FOR THE PLAINTIFF IF SUFFICIENT EVIDENCE IS IN THE RECORD AND, IF SUFFICIENT EVIDENCE IS NOT IN THE RECORD, TO TAKE FURTHER EVIDENCE TO DETERMINE THE MATTER WHERE THE PLAINTIFF HAD PREVIOUSLY MADE NO EFFORT TO SUPPLY THE REQUIRED EVIDENCE ON THE TRIAL IN THE DISTRICT COURT?

The purpose of respondent's two actions in the District Court was to recover the value of the feed fed to petitioners' livestock. As a prequisite to recovery upon such causes of action, respondent was required to prove in the District Court the value of the feed for which it claimed the right to recover. The District Court found that respondent had "failed to prove the reasonable cost of or the amount of feed fed to defendants' livestock". (R. 141.)

Nowhere in the record does it appear that the respondent offered in the District Court the required evidence or was it in any way prevented from proving the same. It offered evidence of a general nature as to the costs to the livestock company per ton of purchasing hay (R. 239-244) but failed to prove the number of tons that were fed to petitioners' livestock. There is evidence in the record that the customary practice was to feed a minimum of one hundred pounds of hay per single-deck car of sheep, and two

hundred pounds of hay per car of cattle (R. 170) but the evidence does not show how many cars of cattle or of sheep were fed or whether the sheep cars were single or double deck. Nowhere in the record does there appear any evidence of the total value of the feed fed nor is there any data in evidence from which the trial Court could have ascertained any of these facts. In its claims, the respondent intermingled its claim for feed with that of so-called service charges. (R. 33-76.) The service charges were paid. (R. 166-167.) Therefore, the trial Court had no means even of ascertaining the total claim of the respondent for feed furnished. Even though the respondent possessed a cause of action to recover a reasonable sum for the feed necessarily fed to petitioners' livestock, it must necessarily, in sustaining its burden of proof, have supplied the District Court with some evidence as to what that amount was. In two successive trials it failed so to do.

As pointed out by the Circuit Court in its decision, throughout the trial and even until oral argument in the Circuit Court after the briefs had been filed, the respondent insisted it was entitled to recover the amounts it had paid to the livestock company, and maintained that the trial Court was without jurisdiction to determine the reasonable value of the feed furnished, the position being taken that that determination was the exclusive function of the Interstate Commerce Commission. At the time of the oral argument in the Circuit Court, this position of respondent was abandoned and it asked the Circuit Court to reverse the case and allow the District Court to determine

the reasonable value of the feed furnished. Apparently, respondent's position in this regard was the reason for its failure to supply the necessary evidence in the District Court. The Circuit Court, while referring to the finding of the trial Court that it could not determine the reasonable value from the record made in that Court, did reverse the case and instruct the trial Court to find such value, first, from the evidence contained in the record if that was possible and if not, to take further evidence.

Petitioners urge that the Circuit Court's decision in remanding the case to the District Court with instructions to enter a judgment in favor of appellant for the reasonable value of the feed, if it could find such value from the evidence then in the record, departed from the accepted and usual course of federal judicial proceedings. The District Court had theretofore found, and the record supports such finding, that the plaintiff in the District Court had failed to prove the necessary facts in this regard. By rule 52(a) of the federal rules of Civil Procedure, the finding of the District Court should not have been set aside unless clearly erroneous. Other Circuit Courts have uniformly held that such a finding of the trial Court should not be set aside unless clearly erroneous or against the clear weight of the evidence. See *United States v. State Street Trust Company,* CCA (1st Circuit), 124 Fed. (2d) 948, *Strong-Scott Mfg. Co. v. Weller* (8th Circuit), 112 Fed. (2d) 389, *Buckley v. Christmas* (4th Circuit), 121 Fed. (2d) 323.

The record will support petitioners' position that there was no evidence before the trial Court upon

which it could have computed a judgment. Apparently, the Circuit Court itself realized this fact or that it might be a fact and that the finding was not clearly erroneous for it further provided in its judgment that if such evidence was not in the record, the District Court should take further evidence on the matter.

It is the policy of the law that litigation must end at some time. If an appellant has failed in the trial Court to prove essential facts necessary to entitle it to a judgment, the ordinary procedure is to affirm the judgment. In a very similar case, *Southern Pacific Company v. United States,* 272 U. S. 445, which involved an action by the Southern Pacific Railroad to recover certain freight charges from the United States, this Court affirmed the judgment of the Court of Claims where the railroad failed in the trial court to prove the reasonable value of its services upon which its claim was based, and held as follows:

> "Petitioner is in no better situation with respect to its asserted right to recover the reasonable value of its services. *The burden was upon it to establish their value. The record contains no finding of the reasonable value of these services, and petitioner failed, as the court below found, to offer any proof of the reasonableness of the rate which it sought to apply.*
>
> Judgment affirmed." (Italics ours.)

In the case of *United States v. Rodiek,* CCA, (2nd Circuit), 120 Fed. (2d) 760, appellant sought to have a case remanded to the trial court to determine certain facts which would have entitled him under his theory to recoup against the plaintiff's demand. The Circuit Court of Appeals of the Second Circuit held:

> "Assuming without decision that such recoupment could have been had under the pleadings, it is a sufficient answer that no proof was offered to show what Hackfeld's taxes should have been, that is, the amount of the unjust enrichment of the United States was not proved. There must come an end to litigation. An appellant is not entitled to have the cause remanded to enable him to establish a defense which he made no effort to prove on the trial."

In the case of *Smith v. Weeks,* CCA (1st Circuit), 53 Fed. 758, wherein the appellant sought to have a case remanded so as to have a certain agreement amended in accordance with the stipulation, the Court held:

> "The validity of the exceptions, and their effect, depend on the status at the time when taken; therefore the agreement in this court cannot directly assist the plaintiff in error. He, however, makes it the basis of a motion to remand. It is plain that this court cannot in this case, if in any, remand unless it reverses; and where there is no error of which this court can take jurisdiction, and there is none in this case, it cannot reverse."

Petitioners urge that under the rules established by the cases hereinabove cited, an appellate court is a court to correct the errors of the trial court. If a party in the trial court fails to prove necessary facts in order to entitle him to prevail in such court and makes no request to be allowed to furnish additional evidence in the trial court, the trial court cannot be in error in dismissing the cause. An appellate court, being one to correct the errors of the trial court, ex-

ceeds its powers in ordering a retrial of a case where no error has been committed by the trial court. If the rule were otherwise, appellate courts in their discretion might in any case remand it for further evidence. The result in such a situation would be interminable litigation. Therefore, the Circuit Court in the present instance should have followed the same course as followed by this Court in *Southern Pacific v. United States,* supra, and affirmed the judgment where the evidence was not in the record and was not supplied by the plaintiff upon whom rested the burden to supply it.

---

(2) IF A CIRCUIT COURT MAY ENTER SUCH A JUDGMENT AS IS MENTIONED IN THE PREVIOUS QUESTION, SHOULD NOT THE COSTS OF THE APPEAL BE CHARGED AGAINST THE PERSON WHOSE DUTY IT WAS TO SUPPLY THE NECESSARY EVIDENCE IN THE TRIAL COURT IN THE FIRST INSTANCE?

If it be conceded that a circuit court in its discretion may remand a case for the taking of further evidence so that the plaintiff in the trial court may prove facts which through its own fault it failed to prove on the preceding trial, it is a most inequitable doctrine that the party at fault should not bear the costs of the appeal. Petitioners here are by the judgment of the Circuit Court required to defray the costs of the appeal. Through no fault of petitioners, the respondent failed to supply the necessary evidence upon which a judgment might have been rendered for it in the trial Court. Yet by the judgment of the Circuit Court petitioners must bear the expense

of respondent's fault. Such a doctrine is contrary to rules heretofore laid down by this Court that where a reversal is required of a judgment because of the fault of one party, that party should bear the costs of the appeal even though such party is the prevailing party on the appeal. *Halsted v. Buster & McGee,* 119 U. S. 341, wherein the court held:

> "This record does not show that the circuit court had jurisdiction of the suit, which depends alone on the citizenship of the parties. In the declaration it is stated that Halsted, the plaintiff, is a citizen of New York, but nothing is said of the citizenship of the defendants. Neither is there anything in the rest of the record to show what their citizenship actually was. For this reason the judgment is reversed, but as the fault rests alone on the plaintiff, whose duty it was, in bringing the suit, to make the jurisdiction appear, the reversal will be at his cost in this court."

To the same effect is *Peninsular Iron Company v. Stone,* 121 U. S. 631.

Your petitioners, therefore, respectfully urge that this Court grant the writ of certiorari petitioned for herein.

Dated, Reno, Nevada,
June 5, 1946.

GEO. B. THATCHER,
WM. WOODBURN,
Counsel for Petitioners.

WM. J. FORMAN,
Of Counsel for Petitioners.